

Cynthia L. Alexander, Esq.  
Nevada Bar No. 6718  
Cassie R. Stratford, Esq.  
Nevada Bar No. 11288  
SNELL & WILMER L.L.P.  
3883 Howard Hughes Parkway, Suite 1100  
Las Vegas, NV 89169  
Telephone: (702) 784-5200  
Facsimile: (702) 784-5252  
[calexander@swlaw.com](mailto:calexander@swlaw.com)  
[cstratford@swlaw.com](mailto:cstratford@swlaw.com)

*Attorneys for Defendant HSBC Bank USA, N.A., HSBC Mortgage Corp, USA, MERSCORP, INC., and Mortgage Electronic Registration Systems, Inc.*

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

KATHRYN E. WOLVERTON, DEBORAH  
GREENE, MICHAEL GREENE, individually and  
on behalf of each other herein,

Plaintiffs,

vs.

HSBC BANK USA, N.A.; HSBC MORTGAGE  
CORP. USA, a Delaware Corporation;  
MERSCORP, INC. a Virginia Corporation;  
MORTGAGE ELECTRONICS  
REGISTRATION SYSTEM, INC., a Delaware  
Corporation; MORTGAGEIT SECURITIES  
CORP, a subsidiary of DEUTSCHE BANK  
NATIONAL TRUST COMPANY; Mortgage  
loan Trust Series 2007-1, Mortgage Pass-  
Through Certificates, and Individuals 1 to 50,  
Inclusive; and ROES corporations 1 to 30,  
inclusive, and all other persons unknown  
claiming any right, title estate, lien or interest in  
the real property described in the Complaint  
adverse to Plaintiff's ownership, or any cloud  
upon Plaintiff's title thereto.

Defendants.

Case No. 2:10-cv-01987-JCM-LRL

**DEFENDANT HSBC BANK USA,  
N.A., HSBC MORTGAGE CORP.  
USA, MERSCORP, INC., AND  
MORTGAGE ELECTRONIC  
REGISTRATION SYSTEMS,  
INC.'S MOTION TO DISMISS AND  
FOR RELEASE OF LIS PENDENS**

COME NOW HSBC BANK USA, N.A.; HSBC MORTGAGE CORP. USA;  
MERSCORP, INC.; and MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.,

(collectively "HSBC and MERS"), by and through their counsel, the law firm of Snell & Wilmer L.L.P., and hereby move this Court to dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b)(6). Defendants also request that the lis pendens on the Property at issue be released.

This Motion to Dismiss this matter with prejudice and for Release of Lis Pendens (the "Motion") is based on the memorandum of points and authorities herein, Plaintiffs' Complaint on file with this Court (the "Complaint"), the exhibits and affidavits attached to this Motion, and any oral argument that this Court may entertain.

Dated: November 10, 2010.

SNELL & WILMER L.L.P.

By: 

Cynthia L. Alexander, Esq.

Nevada Bar No. 6718

Cassie Stratford, Esq.

Nevada Bar No. 11288

SNELL & WILMER L.L.P.

3883 Howard Hughes Parkway, Suite 1100

Las Vegas, NV 89169

Telephone: (702) 784-5200

Facsimile: (702) 784-5252

Attorneys for Defendant HSBC Bank USA, N.A.,  
HSBC Mortgage Corp, USA, MERSCORP, INC.,  
and Mortgage Electronic Registration Systems, Inc..

## **MEMORANDUM OF POINTS AND AUTHORITIES**

### **I.**

#### **INTRODUCTION**

This case is an especially egregious example of Plaintiffs who are improperly utilizing the Court system to avoid the consequences of their default. The claims related to the real property located at 230 W Highland Drive, Henderson, Nevada, 89015, APN: 179-19-211-009 (the "Property") have been dismissed with prejudice *twice before*. The most recent complaint that was dismissed with prejudice was identical to the underlying complaint in this action. This improper use of the Court system must end.

Plaintiff, Kathryn Wolverton's ("Wolverton") improper use of the judicial system started in 2008, when she brought a similar action related to the same Deed of Trust and Property in August of 2008 (the "2008 Case"). The 2008 Case named MERS as a defendant and included

1 various nearly identical causes of action. See, Case No. 2:08-cv-01168-JCM-RJJ. The  
2 Complaint in the 2008 Case was eventually dismissed with prejudice pursuant to a stipulation of  
3 the parties. See Case No. 2:08-cv-01168-JCM-RJJ, Docket #37, a copy of which is attached  
4 hereto as **Exhibit A**.

5 Then, in March of 2010, Wolverton, along with Deborah and Michael Greene, brought  
6 suit again (the "2010 Case") under the guise of a slightly different, but equally meritless case  
7 which re-asserts many of the claims already dismissed with prejudice against the MERS  
8 defendants in the 2008 Case. See, Case No. 2:10-cv-00700-PMP-PAL. The Complaint in the  
9 2010 Case was dismissed with prejudice against HSBC, MERS and Deutsche Bank. See Case  
10 No. 2:10-cv-00700-PMP-PAL, Docket #31, attached hereto as **Exhibit B**. Further, Plaintiff filed  
11 a Motion to Set Aside the Order, which was briefed and denied. See Case No. 2:10-cv-00700-  
12 PMP-PAL, Docket #38, attached hereto as **Exhibit C**.

13 Then on September 29, 2010, Plaintiffs filed a complaint that is identical to the complaint  
14 that had just been dismissed by the Court with prejudice. See, Complaint, compared with the  
15 Complaint filed in Case No. 2:10-cv-00700-PMP-PAL, attached as **Exhibits D and E**  
16 respectively. Plaintiffs also filed a lis pendens and sought a restraining order from the state court  
17 which was denied. See, State Court Docket, attached as **Exhibit F**. This is a bold-faced attempt  
18 to remain in the Property indefinitely based upon merit-less claims that have been adjudicated,  
19 with prejudice, multiple times. All of these claims against HSBC and MERS, which are *identical*  
20 to the previous claims must be dismissed with prejudice because they are barred by principals of  
21 estoppel. See Costantini v. Trans World Airlines, 681 F.2d 1199, 1201-02 (9th Cir.1982) (barring  
22 under res judicata all claims based on the same "transactional nucleus of facts" which "could have  
23 been asserted, whether they were or not, in a prior suit between the same parties") (citation  
24 omitted). In addition it is abundantly clear theses claims are legally deficient and devoid of any  
25 factual basis, which were fully briefed in the Motion to Dismiss in the previous case number Case  
26 No. 2:10-cv-00700-PMP-PAL.

27 Plaintiffs' litigious tendencies with regard to this property are abundantly clear upon a  
28 review of the storied history of this merit-less litigation. Just as with the previous complaints,

1 Defendants are entitled to dismissal of all claims asserted in Plaintiffs' merit-less complaint with  
2 prejudice and a release of the lis pendens.

## 3 II.

### 4 UNDISPUTED FACTS

5 The subject property related to this action is located at 230 W Highland Drive, Henderson,  
6 Nevada, 89015, APN: 179-19-211-009 (the "*Property*"). Wolverton acquired the Property in  
7 2005, as evidenced by a Grant, Bargain, Sale Deed recorded on December 20, 2005. See Exhibit  
8 G. Wolverton's initial purchase of the Property was secured by a Deed of Trust in favor of the  
9 sellers, Tracy Lee Del Fante and Elizabeth Anne Del Fante, as Trustees of The Del Fante 1997  
10 Trust, in the amount of \$450,000.00. See Exhibit H. In addition, Wolverton granted a second  
11 Deed of Trust to Bart Maybie in the amount of \$210,000.00. See Exhibit I.

12 A few months later, in March 2006, Wolverton obtained more traditional financing for the  
13 Property, as evidenced by a Deed of Trust reflecting MortgageIT, Inc. ("MortgageIT") as the  
14 lender, secured by an adjustable rate note in the amount of \$888,000.00. See Exhibit J.  
15 Wolverton would have taken over \$200,000 in cash from this transaction, after paying the prior  
16 beneficiaries of the deeds of trust.

17 Less than a year later, Wolverton again refinanced the Property. On February 8, 2007,  
18 Wolverton obtained an adjustable rate note from MortgageIT in the amount of \$1,000,000.00,  
19 secured by a deed of trust. See Complaint, General Allegations, ¶ 2, See also Exhibit K. This  
20 Deed of Trust is the one at issue in Wolverton's Complaint, and is hereafter referred to as "Deed  
21 of Trust." The Deed of Trust identifies Plaintiff as the borrower, MortgageIT as the lender,  
22 MERS as the beneficiary, and Commonwealth Title as the trustee. At the same time, Wolverton  
23 obtained additional financing through MortgageIT in the form of a balloon note in the amount of  
24 \$160,000.00, as reflected in a second Deed of Trust recorded on February 21, 2007. See Exhibit  
25 L. (Collectively, the Deed of Trust and this Second Deed of Trust are referred to as "Deeds of  
26 Trust").

27 Both Deeds of Trust reflect that MERS is the beneficiary acting solely as lender's  
28 nominee. (Ex. K and L, at pp. 1-2.) The Deeds of Trust further state that "Borrower understands

1 and agrees that MERS holds only legal title to the interests granted by Borrower” and “if  
2 necessary to comply with law or custom, MERS (as nominee for Lender and Lender’s successors  
3 and assigns) has the right . . . to foreclose and sell the Property.” (Ex. K at 3.)

4 On May 19, 2008, a Notice of Default and Election to Sell was recorded by National  
5 Default Servicing Corporation (“NDSC”) with respect to the Deed of Trust, indicating that as of  
6 May 19, 2008, the total amount of delinquent payments was \$29,643.60. See Exhibit M.  
7 Thereafter, MERS, as nominee for MortgageIT, assigned its interest in the Deed of Trust to  
8 HSBC Bank USA, National Association, as Trustee for MHL 2007-1 by its Attorney in fact Wells  
9 Fargo Bank, N.A., successor by merger to Wells Fargo Home Mortgage, Inc. See Exhibit N;  
10 NDSC was substituted as Trustee of the first Deed of Trust. See Exhibit O.

11 Wolverton initiated her first Complaint in August of 2008. See, 2:08-cv-01168-JCM-  
12 RJJ. On August 21, 2008, National Default Servicing Corporation, as trustee, recorded a Notice  
13 of Trustee Sale to occur on September 11, 2008, indicating the total unpaid balance on the Note  
14 was \$1,043,172.04. See Exhibit P. The 2008 Complaint was eventually dismissed with  
15 prejudice via stipulation of the parties in July, 2009. (Ex. A.) After the conclusion of the 2008  
16 Litigation, NDSC recorded a new Notice of Trustee Sale on September 22, 2009. (Ex. P.) As set  
17 forth in the Notice, the Property was sold to HSBC on October 22, 2009. See Exhibit Q.

18 Then, on March 8, 2010, Plaintiffs filed another Complaint naming a slue of defendants  
19 including, MERS, and others that were name in the previous complaint. MortgageIT removed  
20 this matter to federal court on May 13, 2010. See Case No. 2:10-cv-00700-PMP-PAL, Docket #1  
21 attached hereto as **Exhibit R.** HSBC, MERS and Deutsche Bank filed a Motion to Dismiss that  
22 complaint including both estoppel grounds in addition to addressing all of the substantive flaws in  
23 the claims asserted. That Motion was granted on July 19, 2010, and the lis pendens was released.  
24 (Ex. B.) Plaintiffs then obtained counsel who filed a Motion to Set Aside the order. See Case  
25 No. 2:10-cv-00700-PMP-PAL, Docket #36 attached hereto as **Exhibit S.** This Motion was  
26 denied on September 29, 2010. See Case No. 2:10-cv-00700-PMP-PAL, Docket #37 a copy of  
27 which is attached hereto as **Exhibit T.**

28 ///

Less than two weeks later, on September 29, 2010, Plaintiffs filed another complaint, which is identical to the complaint filed in March 2010. Plaintiffs also filed a motion for preliminary injunction and recorded another lis pendens against the Property. (Ex. F.) Then, on November 2, 2010, Plaintiffs filed another request for a temporary restraining order. While counsel had no notice of the pending requests for injunctive relief and as such was not present at the hearing, the moving papers fail to notify the Court of Plaintiffs previous failed attempts to assert identical claims. The request for a temporary restraining order was denied. (Ex. F.) HSBC and MERS removed the complaint on November 15, 2010. (Docket #1).

Plaintiffs must cease filing these base-less claims, which result in the unnecessary use of recourses by Defendants who have defended this action multiple times. As such, HSBC and MERS respectfully request dismissal with prejudice and a release of the lis pendens.

### III.

#### LEGAL ARGUMENT

##### A. Legal Standard

It is well settled law that claims already adjudicated cannot be reasserted because they are barred by the principal of res judicata. Clark v. Bear Stearns & Co., 966 F.2d 1318, 1320 (9th Cir.1992); McClain v. Apodaca, 793 F.2d 1031, 1033 (9th Cir. 1986). This doctrine is vital to the smooth functioning of our judicial system and is designed to ensure “the finality of decisions, conserves judicial resources, and protects litigants from multiple lawsuits. Americana Fabrics, Inc. v. L & L Textiles, Inc., 754 F.2d 1524, 1528-29 (9th Cir. 1985).

Plaintiffs’ most recent complaint is an egregious violation of the doctrine of res judicata because the claims asserted have been dismissed with prejudice multiple times.

##### B. HSBC and MERS are Entitled to Dismissal, Because the Claims are Largely Barred by Res Judicata

###### *i. The Adjudication of the 2008 Complaint Bars this Action*

As briefly stated above, many of the claims asserted in this Complaint are barred by principles of estoppel, or preclusion. MERS was named as a party to all three complaints. See, 2:08-cv-01168-JCM-RJJ, Docket #1, attached hereto as **Exhibit U**. The 2008 Complaint was



1 based upon the same transaction as this—namely for the February 2007 loan transaction secured  
 2 by the property. Id. at ¶ 1, 9. “Claim preclusion prevents the relitigation of claims previously  
 3 tried and decided.” Clark v. Bear Stearns & Co., 966 F.2d 1318, 1320 (9th Cir.1992). As such,  
 4 the claims for breach of the duty of good faith and fair dealing, injunctive relief, declaratory  
 5 relief, fraud and RESPA, which appear in both Complaints must be dismissed.

6 In addition to the identical claims asserted, because the 2008 complaint focused on the  
 7 same subject loan and Property, the current action is precluded on the basis of res judicata and  
 8 estoppel. See Costantini v. Trans World Airlines, 681 F.2d 1199, 1201-02 (9th Cir.1982) (barring  
 9 under res judicata all claims based on the same “transactional nucleus of facts” which “could have  
 10 been asserted, whether they were or not, in a prior suit between the same parties”) (citation  
 11 omitted).

12 *ii. The Adjudication of the March 2010 Complaint Bars this Action*

13 Even more egregious is the fact that in March of this year, Plaintiffs filed an **identical**  
 14 complaint including the same parties and the same claims. This complaint was dismissed with  
 15 prejudice, based upon a Motion to Dismiss that included not only the estoppel based defense but  
 16 also a detailed briefing on the legal deficiencies of the substantive claims asserted. See Case No.  
 17 2:10-cv-00700-PMP-PAL, Docket #21, attached hereto as **Exhibit V**. It is clear that the previous  
 18 dismissal of this **very** complaint bars this action. Plaintiffs multitude of lawsuits, which are  
 19 wasting judicial resources and resulting in unnecessary expense for the defendants named, are  
 20 exactly the type of suits that the doctrine of res judicata is designed to avoid. Because all claims  
 21 asserted in this cause of action are identical to the previous claims asserted against these very  
 22 same defendants, these claims must be dismissed with prejudice and the lis pendens released.

23 **IV.**

24 **CONCLUSION**

25 Plaintiffs have already come before this court seeking identical relief in an attempt to  
 26 avoid the consequences of their default. The instant complaint filed by these litigious Plaintiffs  
 27 who are abusing the judicial system must be dismissed with prejudice as these issues have already  
 28 been fully adjudicated multiple times. As such, MERS and HSBC respectfully request that

1 Plaintiffs' Complaint be dismissed in its entirety with prejudice.

2 Dated this 10 day of November, 2010. SNELL & WILMER L.L.P.

3  
4 By: 

Cynthia L. Alexander, Esq.

Nevada Bar No. 6718

Cassie Stratford, Esq.

Nevada Bar No. 11288

3883 Howard Hughes Parkway, Suite 1100

Las Vegas, NV 89169

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7 Attorneys for Defendant HSBC Bank USA,  
8 N.A., HSBC Mortgage Corp, USA,  
9 MERSCORP, INC., and Mortgage Electronic  
Registration Systems, Inc.

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Snell & Wilmer

L.L.P.  
LAW OFFICES  
3883 HOWARD HUGHES PARKWAY, SUITE 1100  
LAS VEGAS, NEVADA 89169  
(702)784-5200



**CERTIFICATE OF SERVICE**

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On this date, I caused to be served a true and correct copy of the foregoing **DEFENDANT HSBC BANK USA, N.A., HSBC MORTGAGE CORP. USA, MERSCORP, INC., AND MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.'S MOTION TO DISMISS AND FOR RELEASE OF LIS PENDENS** by the method indicated and addressed to the following:


**U. S. Mail**

Kathryn E. Wolverton  
Deborah Greene  
Michael Greene  
4660 Polaris Avenue  
Las Vegas, NV 89103  
Phone: (702) 683-5531  
Fax: (702) 434-4036  
*Plaintiffs Pro Se*

**Electronic Service via CM/ECF**

Laraine M I Burrell, Esq.  
Mark G Tratos, Esq.  
Shauna L. Welsh, Esq.  
Greenberg Traurig, LLP  
3773 Howard Hughes Parkway  
Suite 400 North  
Las Vegas, NV 89169  
Phone: 702-792-3773  
Fax: 702-792-9002  
Email: burrelll@gtlaw.com  
*Attorneys for MortgageIT, Inc.*

DATED this 22<sup>nd</sup> day of November, 2010

  
An employee of Snell & Wilmer L.L.P.

**Snell & Wilmer**  
LLP

LAW OFFICES  
3883 HOWARD HUGHES PARKWAY, SUITE 1100  
LAS VEGAS, NEVADA 89169  
(702) 784-5200